IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No.———

The United States of America, on the Relation of the Riverside Oil Company, a Corporation, Appellant,

vs.

Ethan A. Hitchcock, Secretary of the Interior.

Synopsis of Mandamus Record.

In order that the Court may at once and clearly see what the record of title of petitioner is and the statutes under which it is made, the attention of the Court is called to the statutes involved and the papers filed by Clarke, found in the record. The original statutes are as follows:

"That in cases in which a tract covered by an unperfected bona-fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof, may, if he desires to do so, relinquish the tract to the Government and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract

selected: *Provided, further*, That in cases of unperfected claims the requirements of the law respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims." (Rec. pp. 5 and 6).

"That all selections of land made in lieu of a tract covered by an unperfected bona-fied claim, or by a patent, included within a public forest reservation, as provided in the act of June fourth, eighteen hundred and ninety-seven, * * * shall be confined to vacant surveyed non-mineral public lands which are subject to homestead entry, not exceeding in area the tract covered by such claim or patent: *Provided*, That nothing herein contained shall be construed to affect the rights of those who, previous to October first, nineteen hundred, shall have delivered to the United States, deeds for lands within forest reservations and make application for specific tracts of lands in lieu thereof." (Id. p. 6).

Statutes and regulations relating to the evidence of vacant land.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:

Sec. 2. That registers and receivers shall, upon application, furnish plates or diagrams of townships in their respective districts showing what lands are *vacant* and what lands are *taken*, and shall be allowed to receive compensation therefor from the party obtaining said plat or diagram at such rates as may be prescribed by the Commissioner of the General Land Office; and said officers shall, upon application by the proper State or Territorial authorities, furnish, for the purpose of taxation, a list of all lands sold in their respective districts, together with the names of the purchasers, and shall be allowed to receive compensation for the same not exceed ten cents per entry; and the sums thus received for plats and lists shall not be considered or taken into account in determining the maximum of compensation of said officers.

Approved March 3, 1883. (22 Stat., 484).

Regulations.

Any proper information regarding *vacant public lands* may be obtained by application at any of the land offices, a list of which will be found on page 270.

Land Department Circular, July 11, 1899, page 1.

102. No public land shall be withheld from entry as agricultural land on account of its mineral character, except such as is returned by the Surveyor General as mineral; and the presumption arising from such a return may be overcome by testimony taken in the manner hereinafter described. Sec. 28, p. 15, 616.

Record of Selection.

To the register and receiver, United States land Office, Visalia, California:

Gentlemen: In accordance with the provisions of an act of Congress, approved June 4th, 1897, entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1898, and for other purposes."

I, C. W. Clarke, of San Francisco, city and county, State of California, do hereby select and locate the following described tract of surveyed land, to wit:

The south half of the northeast quarter of section four (4) in township twenty-nine (29) south, range twenty-eight (28) east of Mount Diablo meridian, containing eighty (80) acres.

In lieu of

The southwest quarter of the southwest quarter of section sixteen (16) in township twenty-one (21) south, range seven (7) east; and the southwest quarter of the southwest quarter of section thirty-six (36) in township thirty-seven (37) south, range five (5) east of Willamette meridian, containing eighty (80) acres.

The said last-mentioned tract is included within the limits of the Cascade Range forest reservation in Oregon, and being the owner, and desiring to select other land in lieu of said tract, I made and executed deeds of reconveyance thereof to the United States, on May 5th, 1899, and October 28, 1898, respectively 1899, as pro-

vided by the said act of June 4, 1897, which said deed has been recorded in the proper county and State. I therefore ask that a United States patent issue to me for the land hereby selected.

Witness my hand this 13th day of December, 1899.

C. W. CLARKE,
Post Office Address, care of F. A. HYDE,
415 Montgomery St., San Francisco, Cal.

This paper was supposed by the petitioner to be in compliance with section 2355 of the Revised Statutes of the United States, reading as follows:

Sec. 2355. Every person making application at any of the land offices of the United States for the purchase at private sale of a tract of land, shall produce to the register a memorandum in writing, describing the tract, which he shall enter by the proper number of the section, half-section, quarter-section, half-quarter-section, or quarter-quarter-section, as the case may be, and of the township and range, subscribing his name thereto, which memorandum the register shall file and preserve in his office.

As a result of the first paper filed by Clarke, George W. Steward, Register of the Land Office, certified, page ten of the record, that the land above selected in lieu of land relinquished to the United States, is free from conflict, and that there is no adverse entry, filing or claim thereto. The selections were accompanied by an affidavit of A. Barion, made on the 13th of December, 1899, found on pages twenty-three and twenty-four of the record, which reads as follows:—

U. S. LAND OFFICE,
Visalia, California.

A. Barion, being duly sworn according to law, deposes and says: That he is over the age of twenty-one years, a citizen of the United States and of the State of Cali-

fornia, and a surveyor by occupation, and is well acquainted with the character of the following described land, and with each and every legal subdivision thereof, to wit:

The south half of the northeast quarter of section four (4) in township twenty-nine (29) south, range twenty-eight (28) east, of Mount Diablo meridian, containing eighty (80) acres.

* * * * * *

That the tract applied for is agricultural in character, and contains no known deposits of coal or other minerals, and is not subject to entry under the coal or mineral land laws of the United States.

This affidavit is made upon the evidence found on the surface of the ground; deponent does not undertake to express any opinion as to what may be under the ground.

That he has frequently passed over the same and his personal knowledge of said land is such as to enable him to testify understandingly in regard thereto; that there is not, to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of of coal; that there is not within the limits of said land, to to his knowledge, any placer,cement, gravel or other valuable mineral deposit; * * * that no portion of said land worked for mineral during any part of the year by any person or persons; that said land is essentially nonmineral land, and that the application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes, so far as deponent knows, and that the above and foregoing statements as to the character of said land apply to each and every legal subdivision thereof, and that his post-office address is 420 California Street, San Francisco, California.

A. BARION.

Whereupon the register transmitted the papers to Washington in the following language, page twenty-six of record.

UNITED STATES LAND OFFICE,
Visalia, California, January 22, 1900.

Honorable Commissioner General Land Office, Washington, D. C.

Sir: I transmit herewith the application of C. W. Clarke to select, under the act of June 4, 1897, the N. ½ of S. E. ¼ sec. 4, T. 29 S., R. 28 E., M. D. M.

I also transmit herewith * * * the affidavit of A. Barion as to the character of the land selected.

In re deed from C. W. Clarke and wife to the United States of tract surrendered and abstract of title thereto, see note on back of enclosed application.

The records of this office show the land selected to be free from conflict and subject to such selection.

Publication is ordered under circular of December 18, 1899. Very respectfully,

GEO. M. STEWART, Register.

The affidavit was accepted by the register as sufficient to comply with any rules then known to exist. The said Clarke had no notice of any other requirement; the selection was satisfactory to the register and receiver.

Afterwards, the selection came before the Commissioner for consideration, as seen on page 57 to 71, inclusive. In the opinion of the Commissioner of the General Land Office, bottom of page 59, top of page 60, the proof presented by Clarke was deemed sufficient. Commissioner saying, as above stated, regulations were prescribed for claimants seeking the benefit of said act of June 4, 1897, *supra*, which required the submission of certain proof. This proof (speaking of the affidavit filed) has been furnished in these cases. In addition to this a non-mineral affidavit accompanies all selections. The decision of the Commissioner, was appealed from,

and on said appeal vacated. See bottom of page 97—opinion of the Secretary of the Interior. The Secretary of the Interior held that the affidavit of Barion, filed by Clarke, was not sufficient, and for that reason, *alone*, rejected the selection. The decision of the Secretary vacating the decision of the Commissioner, and holding that the affidavit of Barion filed by Clarke was not sufficient, was rendered on the 25th day of April, 1901.

Whereupon as quick as it could be done, and as soon as Clarke was notified that the affidavit was not in the opinion of the Secretary sufficient, a new affidavit was made curing the defects in the original affidavit. This new affidavit is found on pages 103-4 of the mandamus record, and was made on the 29th day of May, 1901. These papers constitute the record of selection of the land in controversy and include a compliance with section 2355 of the R. S. supra, fixing the only *form* of selection of public land under the law of June 4, 1897. These papers were all accepted by the register and receiver and Commissioner, and were declared as above stated to be sufficient. As quick, however, as the Secretary held the affidavit insufficient a new one curing the alleged defects was promptly made and filed.

SECOND DIVISION OF THE RECORD. For fifty-eight days after the selection and approval thereof by the register and receiver, no papers were filed in the case by any one. The selections were made on the 8th and 13th day of December, 1899. On the 10th day of February protests were made against the selection, in which it

is stated, among other things, that the protestants had purchased from certain alleged locators of placer claims on the land in controversy their alleged rights, whatever they were, and stating further that the land selected was "*mineral in character*," which statement amounts to nothing in the face of Rule 102, supra, found on page 610 of 28 L. D., which reads as follows:

"No public land shall be withheld from entry as agricultural land on account of its mineral character except such as is returned by the Surveyor General as mineral."

Said protest made fifty-eight days after selection prayed, page 44, that the proceedings relating to said application (speaking of the selection) be suspended until *further developments* and operations shall have further demonstrated the *mineral character* and productive capacity of the same for mineral purposes. This protest was filed, page 45, on the 10th of February, 1900. On page 51 of the same record, same prayer to another protest is found in the same language, also filed on February 10th, 1900. These protests do not show or claim any discovery of mineral, if oils be a mineral, nor did they show that a drop of oil had been taken from the property at the time the protests were filed. Accompanying the protests were notices that the alleged grantors of protestants had filed in the County Clerk's Office, a certain notice, which paper does not state that there were any rules of miners prevailing in respect of any of the matters contained in the notice, nor does the record anywhere state the existence of such rules, and

this Court will take judicial notice that there were no such rules in California. The laws of California have abolished all state rules of miners. The said notices of location, stated no discovery of oil. The said protests, put on file fifty-eight days after the selection, constitute the adverse protest record, if these papers may be called a record, against the selection. No contest was initiated under the rules of practice in the land department, as is shown elsewhere in this analysis These papers are simply put into the case by protestants and remain there as dead matter.

THE THIRD DIVISION OF THE RECORD embraces what was done by the Department on these several statutes and papers. As said above, the register and receiver *accepted* the selection, and if any affidavit was required, which is denied, accepted the affidavit of Barion as sufficient. Pages 23 and 24 of mandamus record. For fifty-eight days this record lay unassailed, and if the Land Office had been abreast of its business the patent would have been issued in the meantime. The Commissioner of General Land Office, when the record reached him for action, held that the affidavit of Barion was sufficient (see pages 59–60 of the mandamus record); but the Commissioner also held, page 64, that "under this ruling, the land in these selections mentioned is open to exploration under the mining laws until his approval of the selection, and if at this date of his opinion, December 18, 1900, one year and five days after selection, the lands are shown to contain oil, such showing would defeat the selection." It will be seen that the Commis-

sioner held, that the record of the selector, standing alone, was adequate to vest title to the land selected in the selector, but held further, on page 64 of the mandamus record, and at the bottom thereof, that "the presumption in favor of the selection arising from the character of the tract as shown by the records of the local land office, is *weakened* by the affidavits of the mineral claimants to the contrary, especially as that presumption rests upon the affidavit of Barion." It will be seen that the Commissioner held the record of selection to be good, but ordered a hearing to inquire into the character of the land at the date of selection, on a special officer's report, which is not evidence, holding on page 71 of the record, that unless the selector asked for a hearing within thirty days, his selection would be cancelled without any proof to overthrow it. The Commissioner says that a failure to apply for such hearing (on the part of the selector) within a prescribed time, will be taken as an admission of the truth of the charges. No charges were ever made. This decision of the Commissioner was appealed from, and the appeal decided on the 25th of April, 1901. The order of the Commissioner for a hearing was *vacated*. Page 97, at the bottom thereof. Under the practice in the Land Department, a subordinate officer is required to pass upon all aspects of the case before him, to the end that there may not be several appeals taken from time to time. Under this rule of practice the Commissioner decided that the selection was adequate, and that the proof of it was adequate, but that the protest affidavits, though no proof in them-

selves, *weakened* the proof which was adequate in the absence of such affidavits, and therefore ordered the selector to apply for a hearing or forfeit his selection. He ordered the selector to appear before the register and receiver, within thirty days after notice, and ask for a hearing, and in the event of his failure to ask for a hearing, the record of the selection was to be cancelled without inquiry.

Under the same rule of practice governing the land department the Secretary is required to pass upon all questions in the record to avoid a return of the case on undetermined issues. He therefore did decide all questions in the case. He vacated the order of the Commissioner for a hearing and placed his decision against the selection solely on the ground (page 97 of the record,) that the affidavit of Barion was insufficient; "the proof presented by the selector did not *show*, so he says, that the land was subject to selection, and would not justify the issuance of a patent, even if no protests had been filed." In this decision the Secretary passed upon all questions involved in the case, as he was required to do under the rules of practice of his department.

Turner *vs.* Robinson, 3 L. D., 562.

Lawrence *vs.* Seeger, 25 L. D., 377.

He rejected the selection on the *single ground* that the affidavit of Barion did not *negative* the occupancy of the selected land at the time of selection. This is the sole reason given by him for rejecting the selection. He held, as stated above, that even if there were no protests filed, the defects in the affidavit in the respect mentioned

was jurisdictional and defeated the selection. The Secretary is bound by his reason given Merrill on Mandamus, sec. 40, page 42.

A motion for review was made on this decision, which motion was overruled. The second decision on review was rendered April 12, 1902. In the meantime, as quick as could be done after the first decision, a non-occupancy affidavit was filed (see page 103-4 of record) to cure any defect in the first affidavit, which was acceptable to the register and receiver, and to the Commissioner of the General Land Office. The second affidavit was held by the Secretary to be too *late*, and on page 125 of the record in the mandamus case, he re-affirmed his decision on appeal from the Commissioner, and said that selector had failed to comply with the requirements of the *land office* and to furnish the proof in addition to record proof necessary to *validate* the said attempted selection or to enable the Land Department to issue any patent therefor or to invest in him, the said Clarke, *any right* to the same, and that in consequence of such *failure*, the lands remained the property of the United States and were open to exploration for mining purposes. And inasmuch as it appears that the protestants had gone into possession and occupancy thereof, and had made subsequent discovery of petroleum oil therein (the fact of subsequent discovery was admitted in the petition), and inasmuch as before the said requirements and conditions had been complied with (that is filing a new affidavit) to wit, April 25, 1901 (one year and four months after the selection), discovery was made, the selection was, therefore, and for

that reason rejected. In the last utterances of the opinion, found on page 127 of record in mandamus case in his return to the petition for mandamus, the Secretary says, "This respondent held and *decided* that by *reason* of the *failure* of said Clarke to *show* in due and proper form that the said lands were at the date of said selection subject to selection, was vacant lands open to selections, the attempted selection thereof must be rejected. In E. C. Stimpson, 15 L. D., it is held that an affidavit is no part of a selection.

It will be kept in mind that the return to the petition for mandamus admitted the allegations of the petition for mandamus not denied. These allegations were (page 12 of record) that at the time of said selections by said Clarke no person or persons had any right, title or interest either vested or inchoate in or to said lands so selected by said Clarke; that no discoveries of mineral had been made on said land; that the protestants themselves never staked off any claims for land. On page 17—

"Your petitioner alleges that there was no person present on the selected land at the date of selection. Your petitioner also alleges that no claim adverse to selector existed to said land at the date of selection; that the decision rests solely on the erroneous assumption of the Honorable Secretary of the Interior; that the words vacant land in the act of June 4, 1897, means land free from the presence thereon, actual or constructive, of any one whether claiming said selected land or not."

And on bottom of page 17 it is alleged—

"Your petitioner further alleges that all of the objections to the said selections set forth in said protests were on appeal considered, weighed and decided against and held for naught by the defendant, and the judgment

and findings of the Commis-ioner of the General Land Office and the order for a hearing on said protests were by the defendant reversed, overruled and vacated and judgment thereon on appeal rendered against said protests and protestants and in favor of the selector; but the defendant arbitrarily refuses to pass the said selections to patent, and has arbitrarily ordered the case of the said selections dismissed from his docket solely because of the alleged absence from the record of selection of a non-occupancy affidavit, and not because of any ground or cause of objection to the selections set up in said protests."

All this is admitted. On page 19 it appears in the petition for mandamus that the protestants entered upon the land selected in February, 1900, for the first time, and wrongfully, unlawfully and without the knowledge or consent of the said Clarke, or his grantee, entered into possession of the selected land, and have ever since held and do now wrongfully hold possession thereof and exclude the said Clarke and his grantees therefrom by intimidation and threats of violence, This allegation is admitted. Hence, it appears in the pleadings that the land was selected Dec. 13, 1899, on a record then satisfactory to the land department; that nearly two months afterwards the protestants without filing any claim in the land office and without making any claim of record to the land in dispute, and without itself locating the land or making discovery, violently took possession of it and held the same. All these allegations are admitted, and the decisions of the Secretary were put on the sole ground that the selection was *never valid* because of the absence of a non-occupancy affidavit though not required by any statute of the United States and really not required by any rule, although it will be claimed by defendant that

the regulations of the land department did require it. The regulation relied upon by defendant will be found set out in full on page 7 of record. At the bottom of the exhibit is this language: "An affidavit showing the land selected to be non-mineral in character and *unoccupied*" It is claimed by petitioner that the affidavit actually filed and accepted by the register and receiver and Commissioner was such an affidavit as was called for by this regulation. The regulation invokes an affidavit showing the land selected (which affidavit must necessarily be made after the selection) to be non-mineral in character and *unoccupied*. The statute of June 4 1897, does not use the word *unoccupied*. The *form* of the affidavit is not prescribed by this rule. It is not suggested in the rule itself what language shall be incorporated into a non-occupancy affidavit. Hence, if an affidavit be required at all, the contents thereof must necessarily be such as, in the judgment of the selector and the receiver administrating the rule, comply with the so-called regulation.

The affidavit of Barion, found on pages 23–4 of the record, complies with the rules, so far as the selector and the receiver and register and Commissioner could determine. As quick, however, as that affidavit was criticised by the Secretary, which was done for the first time on the 25th day of April, 1901, selector hastened to supply new affidavit, which is found on pages 103-4 of the record sworn to on the 29th day of May, about a month after it was required, which considering the distance to California and back was supplied with reasonable promptness

Effect of the Return.

A return to a writ of mandamus or an answer to a petition for the writ where the petition is made by statute, the first pleading, as is the case in the District of Columbia, must be certain, definite and explicit.

The return involves or rests upon the personal and official knowledge of the defendant, who alone is enabled to declare the grounds and reasons for his official action complained of. Being possessed of this perfect knowledge, the law requires him to explicitly state the grounds of his action. This requirement rests also upon a principle of public policy that an officer, when his conduct is called in question is required to disclose the reasons for that conduct, which are alone possessed by him.

The return should show a legal reason for not obeying the writ. King *vs.* York, 6 F. R. 490; Springfield *vs.* Handen, 10 Pick., 59. When a writ is traversed, facts must be positively and directly denied and the denial must be single and special as to any allegations intended to be controverted. A general denial in a return is a nullity at common law. When any new matters are relied upon, the return must positively, clearly and specifically set out the facts relative thereto so that the relator may be able to traverse them and the Court may be enabled to see at once whether if established they justify a disobedience of the writ.

When the respondent sets forth in his return matters in abatement and also matters in defence on the merits and asks judgments on the merits, he waives his pleading in abatement. Nothing will be intended in a return

A return is construed most strongly against the pleader.

Allegations in the writ not denied nor confessed and avoided are taken as true. Where officers were called upon to show cause why they refused to prove a bond given to procure a license to sell liquor and in their answer they decline to state their reasons for non-action, it was construed to be fair to assume that they acted arbitrarily and without reason. Merrill on Mandamus, Sections 274-5.

Railway Co. *vs.* McCarthy, 96 U. S., 267.

Where a party gives reason for his conduct and decision touching any thing involved in a controversy, he can not, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is stopped from doing it by a settled principle of law. Gold *vs.* Banks, 8 Wend. (N. Y.) 562; Holbrook *vs.* White, 24 id., 169; Everett *vs.* Saltus, 15 id., 474; Wright *vs.* Reed, 3 Durnf. and E. 554; Duffy *vs.* O'Donovan, 46 N. Y., 223; Winter *vs.* Coit, 71 id., 288.

Admission of Counsel for the Government.

On pages 131 to 133, inclusive of the record in the mandamus case, it will be seen that the Secretary of the Interior and his counsel admit that there was no claim of the protestants to the land to be considered in the case. On pages 131-2-3, of the record, appears a letter from the Secretary to the Chairman of the Committee on Public Lands of the House of Representatives, in which he he states that six United States Courts differ with him about the necessity of any affidavit at all, or the right to

exact one from the selector, inasmuch as it was not required by statute, and asks for an act of Congress requiring such an affidavit. At the bottom of page 133 counsel for the Government and for the defendant in the mandamus proceedings, admits in explicit terms that there was no contest in the case in the land department or in the Court, and the sole issue in the case was between the petitioner and the United States. It would seem therefore clear from quotations from the record that the only ground of controversy in the mandamus case is as follows: First. That by reason of the failure to make an affidavit of non-occupany of the land selected at the time of selection, satisfactory in its expressions to the Secretary of the Interior, he held that the selection was never made, was never brought within the jurisdiction of his department to decide; that the selection was void on its face, independent of the protests. Second. That the selection being void, the record of selection did not operate to seggregate the land selected from public land of the United States, and therefore the selected land was, notwithstanding the record of selection, still open to exploration for mineral oil, and said oil having been discovered within a year or more after the selection and before the second affidavit of Barion, dated May 29, 1901 a year and five months after the selection was filed; selector takes nothing by what he did, the result of which is that the Government retains the relinquished land and the selected land.

It will be kept in mind that the protestants have made no contest for a patent, nor do they propose to do so.

They refuse to give the department and the courts jurisdiction to pass upon their claim. Protestants stand alone upon their trespass. They do not propose to pay anything to the Government for the land they claim to possess as oil land. They wish to keep out of the department and out of the courts; to take the oil in the land, after which they will abandon it, without asserting any right on their part to it.

The proceedings in the land department at no time reached the stage of a contest.

Travis *vs.* Perry, 15 L. D., 23–25.

Nor was the non-occupany affidavit any part of the selection.

E. C. Stimson, 15 L. D., 255.

Bare possession no bar to selection, 30 L. D., 250.

A hearing will not be ordered unless made with intent to assert or acquire title thereto, which intent must be evidenced by an accompanying application to appropriate the land. 8 L. D., 30–31.

A certificate of location is not evidence of mineral. 28 L. D., 174; 17 L. D., 424. The existence of gold does not make the land in which it is contained mineral. It must be in *paying* quantities. 7 L. D., 71; 13 L. D., 86; 17 L. D., 424; 30 L. D., 327.

A mining location is not *prima facie* evidence that the land is mineral. 30 L. D., 442–49.

To transform a protestant into a contestant a change of attitude in the case must occur. A contestant must pay costs. 6 L. D., 765. Under the rules of the Land Department additional evidence may be filed in *ex parte*

cases at any stage of the case. Rule 100. The affidavit, pages 103 and 104, should have been considered mandamus record.

The Distinction between a Protest and a Contest is very clear under the Law and the Rules of Procedure of the Land Department.

A protest is simply an admonition to the Government by a letter or affidavit or telegram that the protestant will, if desired by the Government so to do, furnish evidence in favor of the Government of the character mentioned in the protest. Brewer, Judge, in 21 Fed. Rep. 21 Federal Reporter. A protestant takes nothing by a protest, and if the protest be decided against, that is the end of the protestant in that particular record.

The mere filing of the protests did not and could not initiate a contest is apparent upon reference to the Rules of Practice of the Land Department.

1. Initiation of Contests.

Rule 1.—Contests may be initiated by an adverse party or other person against a party to any entry, filing or other claim under laws of Congress relating to the public lands for any sufficient cause affecting the legality or validity of the claim.

Rule 2.—In every case of application for a hearing an affidavit must be filed by the contestant with the register and receiver, fully setting forth the facts which constitute the grounds of contest.

Rule 3.—Where an entry has been allowed and remains of record the affidavit of the contestant must be accompanied by the affidavits of one or more witnesses in support of the allegations made.

2. Hearings in Contested Cases.

Rule 4.—Registers and receivers may order hearings

in all cases wherein entry has not been perfected, and no certificate has been issued as a basis for patent.

Rule 5.—*In case of an entry or location on which final certificate has been issued, the hearing will be ordered only by direction of the Commissioner of the General Land Office.*

Rule 6.—*Applications for hearings under Rule 5 must be transmitted by the register and receiver, with special report and recommendation, to the Commissioner, for his determination and instructions.*

Notice of Contest.

Rule 7. At least thirty days' notice shall be given of all hearings before the register and receiver unless, by written consent, an earlier day shall be agreed upon.

Rule 8.—The notice of contest and hearing must conform to the following requirements:

1. It must be written or printed.
2. It must be signed by the register and receiver, or by one of them.
3. It must state the time and place of hearing.
4. It must describe the land involved.
5. It must state the register's and receiver's number of the entry and the land office where and the date when made, and the name of the party making the same.
6. It must give the name of the contestant and briefly state the grounds and purpose of the contest.
7. It may contain any other information pertinent to the contest.

It is thus apparent that, after a selection on which final certificate has been issued, as was the case here, a contest can be allowed or declared only by the Commissioner of the General Land Office, whose function is to determine upon the *ex parte* affidavits filed against an entry or selection, or other information which may be in his possession, whether sufficient showing for allowing or ordering a contest appears.

There is a great misapprehension of what constitutes a *contest*, how began and the legal import thereof. The Government, by the law of May 20, 1880, 27 Statutes at Large, 270, indicated that "in all cases where any person has contested, paid the land office fees and procured the cancellation of an improper homestead, or timber culture entry, he shall *have the preference right to buy*. This is a personal right not assignable. The right to contest under this statute is limited to entries mentioned in the act, to wit, preemption (which is now repealed) homestead, timber culture entry, or possibly desert land and other agricultural preliminary entries, made to initiate agricultural claims to land. It has no application to the case at bar. It does not embrace contests between mineral and agricultural claimants. The contestants, under the law of 1890, by breaking down the entry has for thirty days under this act the *preference right to buy the land*. He is rewarded as an informer. The practice which the land department has established in the execution of this statute (speaking of contests) declares that "in case of any entry or location on which final certificate has been issued the hearing will be ordered only by direction of the Commissioner of the General Land Office, page 1 of the Rules of Practice of the General Land Office. Rule 5 and by Rule 7 "at least thirty days' notice shall be given of all hearings before the register, unless by written consent an earlier day shall be agreed upon. Rule 8 declares page 8 of the Rules of Practice the NOTICE of contest and hearing must conform to the following

requirements. First, it must be written or printed. Second, it must be signed by the register and receiver, or by one of them. Third, it must state the time and place of hearing. Fourth, it must describe the land involved. Fifth, it must state the register and receiver's number of the entry and the land office where and the date when made and the name of the party making the same. Sixth, it must give the name of the contestant and briefly state the grounds and purpose of the contest. Seventh, it may contain any other information pertaining to the contest."

This notice is the summons and is jurisdictional. It will be seen that no such paper as that is in the record. No one can attack a record entry without a pleading and summons. 116 U. S. 52. It appears from the record that the order of the Commissioner for a hearing, made without any accusation against the selection, was vacated. In 27 L. D. page 555, Irwin *vs.* Hayden, the Secretary says: "The purpose of the rule requiring an affidavit of contest to be corroborated is to assure the Government of the good faith of the contestant and not that jurisdiction may be vested in the local officers, that being obtained by *service of notice only.*" It is not sufficient to set up occupany of the land even in a contest to entitle the party to a contest. "Possession and occupany of the land in contest, with intent to appropriate it under the timber culture laws, is not sufficient to except said land from the grant to the company contained in section 3 of the act of July 2, 1864, 13 Statutes at Large, 367." Timber culture claims

and rights can be initiated only by *entry* at the local land office and are not derived from antecedent occupancy, improvement and cultivation. Northern Pacific R. R. Co. *vs.* White, 452, 453. Jurisdiction does not vest in the Land Department to entertain a contest against an entry already allowed because of any statement, however strong, of a contestant, that he has a prior right to buy. There must be NOTICE (in the nature of a summons and pleading together) given, stating the FACTS above enumerated. On page 454, 19th L. D., in the case of Shugran *vs.* Dillman, Secretary Smith says "where an entry has been allowed and remains of record, the affidavit of the contestant must be accompanied by the affidavits of one or more witnesses in support of the allegations made. The purpose of the rule is to assure the Government of the good faith of the contestant and not that *jurisdiction* may be vested in the local officers, that being obtained *only* by service of notice. Houston *vs.* Coyle, 2 L. D., 58. Seitz *vs.* Wallace, 6 L. D., 299. No one can get a preference right to buy through a protest. In Jacoby *vs.* Kubel it is held 29 L. D., page 168, that a prior right of entry under the act of May 14, 1880, cannot be secured by proceedings on protests against an application to enter. A stipulation between the parties that a hearing ordered on a protest shall be treated as a contest will not give the protestant the *right* of a contestant if he has not *brought himself within* the *rules* regulating the initiation and prosecution of a contest. In such case he is a mere informer without interest, and as such could not have such a *claim to the land* as would

defeat Reference Board of Equitable Adjustment. Cooke *vs.* Villa, 19 L. D., page 442. It is held in Mendenhall *vs.* Gagle, 30 L. D., page 11, that "in a contest under section two of the act of May 14, 1880, the contestant must *pay* the *costs* of the contest, including the cost of testimony taken by depositions on behalf of contestee. Neither a contest nor a protest gives jurisdiction to the Land Department to enquire into an *entry* where whatever infirmity there is in the entry, if any, appears on the *face* of the entry itself. State of Utah *vs.* Allen, 27 L. D., page 53. It will be kept in mind that in the case at bar the Secretary decided the case on the record of selection alone.

The corroboration of a protest is not essential where the Land Department is bound to take judicial notice of the matters charged. The right to protest or the right to contest rests upon allegations of fact or law dehors the records. It is otherwise a useless proceeding. Every tribunal takes judicial notice of its record in a case, and if that record break down for reasons apparent on the face of the record, as our adversaries claim in this case, no jurisdiction to assail the record is acquired by a contest which has for its purpose the introduction into the record of matters that do not already appear therein. A protestant, as said above, is one who admonishes the government of some wrong *done the Government.* (104 U. S., 694.) If the protest fail, the protestant is done. (Page 696, 21 F. R., *supra;* 21 Fed. Rep., *supra,* 694.)

There is no ground in this record whereon to base a contest by a stranger to the title. The record herein is a Government record.

Where the subject-matter of the defect, if any, in the record is one that effects the *Government only*, no private person can set it up. The Government alone has the authority to vindicate its own rights. It must do so by some pleading. (Lee *v.* Johnson, 116 U. S., 52.)

Land Mineral in Character.

The most that is claimed in the protests, however, is that the land selected was "*mineral in character*" when selected. This we deny, but if true, it could not be made the ground of contest or protest for the reason that Rule 102 of the Land Department Regulations, found on page 610 of 28 L. D., declares that "no public lands shall be withheld from entry as agricultural land on account of its *mineral character*, except such as is returned by the Surveyor-General as mineral." This rule excludes the hypothesis that land suspected of being mineral; not known to be mineral is because of such suspicion withdrawn from agricultural entry. This rule makes clear the proposition that in order to take mineral land out of the law of acquisition of agricultural land, it must *be known* to be mineral at the time of its entry or selection.

In this case the Court will see by the record that the protestants in this case entered on the land for the first time about February, 1900, without the knowledge, consent or permission of the selector, who selected the land December 8th and 13th. It is seen that protestants do not claim this land by any location thereof made by themselves, but by purchase from some locator who had

not discovered oil therein, and who by sale abandoned it. Black *vs.* Elkhons. If one stake off a piece of ground without having acquired any estate therein, and attempts to sell it, he transfers no interest. Orton *vs.* Smith, 18 How., 265. He can not thereby give a preference right to buy. 1 L. D., page 76. In Matthews *vs.* Lines, 29 L. D., page 178, Secretary says "conceding that one who furnishes evidence on which a patent is set aside is equitably entitled to a preferred right of entry, there is no authority for recognizing such equity as the subject of transfer.

No land is subject to acquisition under the mineral statutes upon which there has not been a discovery of valuable mineral deposits. (Sec. 2320 of the Revised Statutes.) One who has no right to buy if his adversary were out of the way is not a contestant. (Black *vs.* Elkhorn Mining Co., 163 U. S., 445.) Third persons are shut out of the right to attack an entry where the land has been paid for. (30 L. D., 265, 145, U. S., Ala. Mercy Co. *vs.* Benson.)

It is submitted that the Court will find that these protests rest upon the affirmation of the protestant, that the lands selected were *mineral in character.* This we have shown is immaterial under the Rule 102, supra, if such were the fact, but it will appear also to this court by the prayer of the protests, filed February 12, 1900, and found on page 44 of record, that the protestant knew that the land had not disclosed mineral, for in said prayer the following language is used: "Wherefore, contestants pray that further proceedings relating to said applica-

tion (speaking of the selection) be suspended until further developments and operations shall have further demonstrated the mineral character and productive capacity of the same for mineral purposes;" and on page 51 of record in another protest, filed the same day, the prayer is: "Wherefore, contestants pray that further proceedings relating to said application (speaking of said selection) be suspended until further developments and operations shall have further demonstrated the mineral character and productive capacity of the same for mineral purposes." The theory of the protestants was for a long time during this litigation, that if it appeared from two to four months after selection that the selected lands contained mineral oil, this fact acted backwards. The Court of Appeals of California, however, held, and the Land Department held, in these very cases, that *subsequent discovery* of mineral did not vacate or affect the selection. The protests themselves, and the affidavits in support of them, though they cannot be received as a contest, and are not evidence of anything fairly construed by the Court, show that the land selected was only *suspected* of being oil land by protestants when selected.

There was no contest at any stage of the case on any matter furnished by Protestant.

The Court will see that even the Commissioner ignored the matter set up in the so-called protests, page 70 of the record. He says that the proceedings will be had upon instructions governing the manner of proceedings *upon special agents' reports.* Approved August 18, 1899. (29

L. D. 141, on page 71.) It appears that whatever proceedings the Commissioner ordered against the selection rested upon special officer's reports, thereby ignoring the method of procedure provided for in protests or contests between individuals. The special officer making the report was acting for the Government, and the proceeding on that report was a proceeding by the Government (see page 71 of record), as distinguished from a proceeding on a protest or contest affidavit. The order of the Commissioner, therefore, overruled the protests, and held that the record of selection was valid on its face, and unless successfully attacked by the Government required the issuing of a patent to the selector. This order for a hearing made by the Commissioner on a special officer's report was vacated by the Secretary on appeal, and the face of the record of selection alone considered. The distinction between methods of procedure on the s ecial officer's report and on affidavits of protest or contest was recognized by the attorney for the Government in presenting this case to the Court of first resort, found on page 133 of record, wherein he stated to the Court in the mandamus proceeding that:

"The issue in this case, if your Honor pleases, is not an issue between the selector and the protestant or the contestant in any sense. It is an issue between the selector and the United States. The protestant is not in this Court in any way, direct or indirect. He was not in the Land Department in respect to the matter which we have here considered, except as a means of informing the United States that the land which the selector attempted to take under this act was not subject to be taken under that Act. The issue is here. Whether or

not by certain proceedings in the judicial department of the Land Department a title—legal title, not the equitable title but the legal title—is vested in the selector, so that the issuance of the patent has been reduced and shrunken to a ministerial act."

It will be seen that the Commissioner proceeded on the theory that the record of selection was good on its face and unless sucessfully attacked by the Government itself on a proceeding resting on its own special officer's report, 29 L. D. 141, a patent must issue, while the secretary on appeal rested his whole defense on the alleged invalidity of the record of selection *on its face*. This was the sole proposition argued as is established by quotation from learned counsel for the Government above. The secretary withheld the patent, not because of any thing in the protest, but because in his opinion the record of selection was *void on its face*, and this is the theory of the defendant at this time. The alleged ground of the inefficiency of the record on its face set up by the Secretary is the alleged absence of a non-ocupancy affidavit accompanying the selection. Our answer to this is two-fold. *First*, that no such affidavit is required to accompany the selection by the law of June 4, 1897, under which it was made, and *second*, that the affidavit actually filed, fairly construed and accepted by the register and receiver, as a non-occupancy affidavit and also by the Commissioner, is really a non-occupancy affidavit.

Ex parte protest affidavits are not evidence of anything 3 L. D. 250, nor is it a pleading. Johnson *vs.* Leighton, (Brewer Judge); 7 Kansas 359, special agent's report no evidence; Henry C. Putnam, 5. L. D. 22.

Mandamus the Remedy.

It must be clear, therefore, that the defendant did not and could not adjudicate any controverted question of fact, and does not plead that he did; and that his action in rejecting the selections was for lack of alleged non-occupancy proof, was unwarranted and, in legal contemplation, void and of no effect. The selections, therefore, in legal contemplation, stand as they did when this unwarranted action was taken, and the primary relief that the selections be reinstated follows as consequence.

The defendant, however, was, as well ruled to answer the allegations of the petition, and show cause why he should not pass the selections to patent, and offers no reason other than the lack of non-occupancy affidavit, but by his answer admits that the lands, at the time of his selection, when the selector's title vested, was both of record and in fact vacant and open to settlement, even under his own attempted application of these terms, thus in any view rendering wholly unwarranted the preferring of charges against the selections.

The defendant admits that at the time of selection the lands were vacant lands, open to settlement.

First. This is the necessary implication from the language of his decisions.

In his decision of April 12, 1902, he says (R.):

"Nor do the papers presented by the protestants assist the selector in this matter, because so far as they make any suggestion respecting the condition of the lands in controversy at the time of their attempted selection, it is

to the effect that they were occupied for the purpose and in the course of mining exploration and work, which were being conducted with a view to the development and utilization of deposits of mineral oil believed to exist therein; and as indicating that this occupancy was in good faith and within the protection of the mining laws, it appears, by admission of the parties, that this mining exploration and work resulted in the production of petroleum oil in large and valuable quantities, giving to the land an unquestioned mineral character."

Second. It is also the necessary implication from the language of his answer.

In stating the substance of his decision of April 25, 1901, he says, that in consequence of Clarke's failure to accompany his selections with non-occupancy proof (Par. R.):

"The lands remained the property of the United States, and open to exploration for mining purposes, or to occupation and entry under the laws, and within the jurisdiction and control of the Land Department. And inasmuch as it further appeared in proof and was admitted that, while the said lands so remained the property of the United States, and so opened to exploration, or to occupation and entry, and before the said selector Clarke had, by proper averments, shown that the said lands were subject to selection, or that he was entitled to select the same as vacant lands open to settlement, the protestants had gone into possession and occupancy thereof, and had made discovery of petroleum therein, and were claiming, working, and developing the same, under certain placer mining locations, under the laws of the United States in that case made and provided; and inasmuch as before the said requirements and conditions had been complied with, it became known, and was admitted, that said lands were, in point of fact, valuable for mines and minerals, and worthless for agricultural purposes; therefore, the said supposed selections of the

said Clarke should not be and were not approved, and the same were accordingly rejected, which decision is referred to in the petition herein, and a copy of which is filed therewith, marked 'Exhibit T.'"

And referring to the supplemental affidavits filed by the selector after the defendant's first decision, he says that prior to the filing of the supplemental affidavits the protestants had entered upon the said lands, and—

"Were claiming, working and developing the deposits of mineral found therein, and because of the fact that the said lands had thereby and before the filing of the said affidavits become known as valuable for minerals and had acquired the known character of mineral lands under the laws of the United States, and as such were not open to settlement."

Third. By not noticing the allegations of the petition as to the condition of the land at the time of selection, the answer admits the truth of those allegations.

This fundamental rule of pleading was apparently ignored by the Court of Appeals, who seemed unwilling to recognize its effect in eliminating every question of fact from the case, and in view of the attitude of the court below we deem it prudent to cite the authorities.

The Code of the District of Columbia, chapter 42, governing the practice in mandamus, provides—

Sec. 1273. How applied for.—All applications for granting writs of mandamas shall be commenced by petition, verified by affidavit of the applicant, setting forth fully the ground of his application.

Sec. 1274. Rule on defendant.—Upon the filing of such petition the court may lay a rule requiring the defendant therein named to show cause within such time as the

court may deem proper why a writ of mandamus should not issue as prayed, a copy of which rule shall be served upon such defendant by a day to be therein limited.

Sec. 1275. Defendant's answer—The defendant by the day named in such order, unless for cause shown the court, shall extend the time, shall file an answer to such petition, fully setting forth all the defenses upon which he intends to rely in resisting such application, which shall be verified by his affidavit.

As will be observed the defendant is required to file sworn answer to the petition (the answer taking place of the former return to the alternative writ) and fully set forth all the defenses upon which he intends to rely in resisting the application.

As the Court of Appeals itself has said in U. S. ex rel West *vs.* Hitchcock (D. C. App):

"The act of Anne, equally with the new Code, contemplates a *return* or answer to the writ, not a demurrer to the petition; and it contemplates that in this return or answer all the facts shall be stated upon which the respondent proposes to rely. It does not contemplate that he shall keep back any of the facts by relying first on a demurrer to the petition and then falling back upon his answer, which would be proper enough in ordinary cases, but not in proceedings in *mandamus*."

"The return should be an answer or statement of facts showing the grounds upon which the respondent has acted or refused to act. It may state the facts in part or in whole by denying or admitting the allegations of the petitition, or by qualifying or explaining them; but it should in some way state all the facts necessary and proper for the determination of the cause."

Mandamus is an action at law and governed by the rules of pleading.

See the full treatment of the subject in Tapping on Mandamus, 348, et seq.

Every material allegation of the writ which is not denied in the answer or return is to be taken as admitted.

Shortt on Mandamus, p. 386.

Merrill on Mandamus, Sec. 274.

Tapping on Mandamus, 349.

13 Enc. Pl. and Pr. 734.

Any material allegations intended to be traversed should be expressly denied, and not in a doubtful or circuitous manner, or argumentatively. The return must answer, not the words, but the materiality of the writ; a return which seems to be guarded and not to deny the substance is bad.

Shortt on Mandamus, Informations and Prohibition, p. 386–7.

High on Extraordinary Legal Remedies. Sec. 472.

Tapping on Mandamus, 352–3.

Return is construed most strongly against the pleader.

Merrill on Mandamus. Sec. 274.

If return evasive or frivolous may be disregarded or stricken from files.

Merrill on Mandamus. Sec. 284.

In order to be good the return must show a sufficient reason for not obeying the mandatory clause of the alternative writ. The Court will not presume for or against its sufficiency.

Shortt on Mandamus, p. 390.

The courts have exacted from the defendant the utmost definiteness and certainty in the allegations of his return, and this not only before but also since the Statute 9 Anne, c. 20.

Shortt on Mandamus, p. 393.

A return which shows a fact only by recital is insufficient.

Shortt on Mandamus, p. 394.

A denial on information and belief being insufficient the material averments of the writ so denied will be taken as admitted.

State *vs.* Williams, 96 Mo., 13.

Merrill on Mandamus. Sec. 280.

A return which is inconsistent or repugnant will be quashed and peremptory writ issued.

High on Extra. Legal Rem. Sec. 477.

The facts being thus admitted, the case clearly falls within the prinicple of the American School of Magnetic Healing *vs.* Mc Annulty, U. S., and the action of the defendant in attempting to reject the selections for lack of accompanying non-occupancy proof is, as said in that case:

"A clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding to grant relief."

And the requirements of accompanying proof of non-occupancy being unwarranted, and the lack of such proof being an insufficient excuse for rejecting the selections, mandumus should issue to compel the reinstatement and patenting of the selections.

In the analagous case where an unwarranted regulation was pleaded as a defense to mandamus, the Court of Appeals, citing Roberts *vs.* Valentine, used the following language which we submit lays down the principle contro ling here:

"But the refusal of permission to the relator to build upon his lots as proposed is the denial of the right of property. It is admitted that his proposed buildings conformed in respect of materials, safety and healthfulness to the building regulations proper, and that permission would have been issued as a matter of course had the lots been of the depth of fifty feet. *As that regulation is not within the power conferred to make building regulations, and cannot constitute a defense under the act regulating the subdivision of lots, it is the plain duty of the Commissioners to issue the permit* upon the payment of the lawful fees, which the relator is ready and willing to do. The act required of them being a purely ministerial one, can be enforced by the writ of mandamus."

MacFarland *vs.* U. S. *ex rel* Miller, 29 W. L. R. 753.

In conclusion we submit an index of the subjects—~~D. C. App.~~—covered in following brief and appendix and ask a careful consideration of the arguments under the the several heads:

Index of the Following Brief.

Statement of the case, pp. 1 to 9.

1. The effect and operation of the act of 1897. pp. 9 to 16.

The function of the Register and Receiver. (Pp. 12–14.) The supervisory power of the Land Department. (Pp. 16–18.) The remedy. (Pp. 18–19.)

II. The Defendant's Contention. (Pp. 19–27.)

The supervisory power of the defendant is purely ministerial. (Pp. 20–27.)

There was no judicial question before him for determination. (Pp. 20–21.)

Nor is there here any question of executive discretion. (Pp. 22–23.)

The scope of mandamus. (Pp. 27–31.)

It is not permissible to import into a statute a word not found there. (Pp. 31–33.)

If "unoccupied," could be held to be the equivalent of "vacant," then "unoccupied" must also be inserted in the place of "vacant," in the act of 1883. (P. 33.)

III. The Statute is Plain and Leaves no Room for Construction. (Pp. 33–48.)

The defendant himself had previously declared that the act was too plain to admit of construction (Pp. 33–34.)

The Land Department drafted the act of June 4, 1897, and stamped it as free from ambiguity. (Pp. 34–35.)

The meaning of "open to settlement." (P. 35.)

Mineral and Non-Mineral Land. (Pp. 35-39.

Petroleum not mineral. (P. 37.)

The status of the protests. (Pp. 37-38.)

The meaning of "vacant." (Pp. 39-48.)

The use of the word "vacant" by the Land Department in its Official Publications. (Pp. 40-43.)

The use of the term "vacant" in the published decisions of the Land Department. (P. 43.)

The use of the term "vacant" in previous Legislation. (Pp. 43-48.)

IV. The Defendant's Error with respect to the meaning of the Statute. (Pp. 58-64.)

He subverts the established rules of interpretation. (Pp. 48-52.)

V. Even if the term "vacant" could be held to mean "unoccupied it would be equally clear that the Defendant's action could not be sustained. (Pp. 58-72.)

What the defendant means by unoccupied. (Pp. 58-64.)

Occupancy, as the defendant intends it, is not mere presence on the land but possession by authority of law. (Pp. 63-64.)

The action of the defendant is an attempt to to resurrect the exploded doctrine that a claim to public land, can attach by occupation. (Pp. 64-65.)

"Unoccupied" is merely a magic term to conjure with, a mere shadow without substance. (P. 65.)

But under the practice of the Land Department it would not be necessary to substitute "unoccupied" for "vacant" in order to protect such a settler, for (Pp. 65-71.)

And even an express reservation of "occupied" land or land "settled upon" is not, and never has been held to be, an exception of the land from the grant or general disposition as between the Government and grantee or entryman, but a mere reservation of the right of the settler or occupant which he might abandon or forfeit. (Pp. 66-71.)

The policy of the defendant in substituting "unoccupied" for "vacant." (Pp. 71, 72.)

VI. Evidence of Non-occupancy could not be Essential to Selection Under the Act of June 4, 1897, Even if Vacant could be Held to Mean Unoccupied in its Broadest Sense. (Pp. 72-81.)

The Land Department can require evidence only when the statute or the rules of contract and evidence so require. (Pp. 73-76.)

And where the law has made no specific requirement of proof the Land Department can require proof only in cases where the burden is thrown upon the claimant by the application of the rules of evidence. (Pp. 76-81.)

VII. The Alleged Regulation Requiring a Non-occupancy Affidavit is Void. (Pp. 81-86.)

The Land Department has no authority under the act of June 4, 1897, to make any such regulation. (Pp. 81, 82.)

Nor can authority be found in any provision of the Revised Statutes or any general statute. (Pp. 82, 83.)

The alleged regulation is not appropriate. (Pp. 83-85.)

The alleged regulation is inconsistent with law. (Pp. 85-86.)

VIII. At the time the selections were made the defendant had not made or promulgated any regulation requiring the filing of proof of non-occupany. (Pp. 86-89.)

The alleged regulation was too vague and uncertain to be valid. (Pp. 86-87.)

Recital in a form neither prescribed nor promulgates the substance of the recital as a regulation. (Pp. 87-89)

IX. Even were the alleged regulation valid, the form and substance of the affidavit were left to the judgment of the local officers. (Pp. 89-90.)

X. Even were an affidavit or other proof of non-occupany essential it could not be conditioned precedent to title vesting. (Pp. 90-98.)

Even were the alleged regulation valid it amounts only to an approval of the practive of filing such an affidavit, or, at most, a direction to the local officers, and there is no intimation that failure to file the same with the form of selection will invalidate the transaction. (Pp. 93-95.)

Even regarded abstractly the defendant's contention resolves into absurdity. (Pp. 96-97.)

Even from the defendant's stand point the object of the affidavit has been accomplished. (Pp. 97-98.)

XI. The Land Department itself, in passing to patent dozens of selections not accompanied by proof of non-occupancy, and in not enforcing the alleged regulation, even had the same been valid, had established a rule of administration under which the selector made his selections and in any event can not legally apply a different rule retroactively to defeat those selections. (Pp. 98-99.)

XII. The requirement of a non-occupancy affidavit if supportable, and if not satisfied by the affidavits accompanying the selections, was waived

by the local officers in accepting the selections without demanding or requiring a further affidavit. (Pp. 100-103.)

Appendix A.

Petroleum is not Mineral. Petroleum Lands are are not Reserved from purchase or Entry Under the General Laws, and Under the Act of February 11, 1897, no Rights Attach Until Entry. Pp. 1-15.

The Origin and Nature of Petroleum. (Pp. 1-2.)

Petroleum belongs in the same category as Water. (Pp. 2.)

Lands valuable for Petroleum are not mineral lands. (Pp. 3-12.)

First. The act of 1897 is a legislative recognition that petroleum is not mineral within the meaning of the land laws. (Pp. 12-13.)

Second. No rights attach under the act of February 11, 1897, until the application to enter (Pp. 13-15.)

The rulings of the present administration of the Land Department. (Pp. 15.)

Respectfully submitted,

SHERLEY C. WOOD,
JEFFERSON CHANDLER,
JOHN M. THURSTON,
WM. C. PRENTISS,
M. A. BALLINGER,
Attorneys for Plaintiffs in Error.